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STATE OF WISCONSIN **08-19-2019**

COURT OF APPEALS

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OF WISCONSIN**

DISTRICT III

Case No. 2018AP2220-CR

STATE OF WISCONSIN,

Plaintiff-Appellant

v.

ADAM W. VICE,

Defendant-Respondent

**On appeal from an order suppressing evidence, entered in the Circuit Court
for Washburn County, The Honorable John P. Anderson, presiding**

**BRIEF OF THE
DEFENDANT-RESPONDENT
ADAM W. VICE**

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III. Statement of issues presented for review.

This appeal presents the following issues for review:

Was Vice's confession elicited during a post-polygraph interview voluntarily given? The circuit court held that Vice's confession was not voluntarily given, and suppressed his statements made during the post-polygraph interview.

Do cogent, substantial, and proper reasons exist for this Court to reconsider whether Vice's post-polygraph interview was a totally discrete event from his polygraph examination? The circuit court hinted, but did not rule on whether cogent, substantial, and proper reasons existed for this Court to reconsider whether Vice's post-polygraph interview was a totally discrete event from his polygraph examination.

Was Vice's post-polygraph interview a totally discrete event from his polygraph examination? The circuit court, while concluding it was compelled to accept this Court's decision that Vice's first trial counsel had conceded the issue, made factual findings to support a conclusion that Vice's post-polygraph interview was not a totally discrete event from his polygraph examination.

IV. Statement on oral argument and publication.

This case involves an unusual fact pattern in which a polygraph examiner attended a post-polygraph interview, and in the course of that interview made constant references to the polygraph examination and its results, and did so as an integral and essential part of his interrogation strategy. The strategy included leading Vice into believing that he must have committed the crime because the polygraph machine said he did. Vice came to believe this, even though, initially he had no recollection of committing the crime. This Court's decision should be published, and this Court would benefit from oral argument.

V. Statement of case and facts.

In the early part of December 2014, Detective William Fisher of the Washburn County Sheriff's Office was assigned to investigate allegations of sexual assault made by a four-year-old girl with the initials E.J. (R.109:7). E.J.'s allegations included Adam Vice. (R.1). When Vice denied any wrongdoing, Fisher suggested that Vice take a polygraph examination in order to clear his name. (R.109:15-16 and 44-45). Vice agreed. *Id.* Vice, having no means of transportation, was driven by Fisher to the Eau Claire Police Department for the exam. (R.109:45). Vice did not have a cell phone, and had no means of communicating with anyone other than the detectives during the trip, the exam and the subsequent interview. (R.109:23).

The polygraph examination was held on December 11, 2014. (R.109:26). The examination was conducted by Detective Ryan Lambeseder of the Eau Claire Police Department. (R.109:25-26). Prior to the polygraph examination, Lambeseder had Vice sign two forms, a Waiver-of-Rights form, and a Polygraph Examination Consent form. (R.109:25-30; R.10:1-3). At no time, either before or after the polygraph examination, was Vice told that the results of a polygraph examination would be inadmissible in court. (R.109:37 and 20).

The polygraph examination took approximately an hour and forty-five minutes. (R.109:32). Vice later testified that during the polygraph test "I felt really nervous. I was told that I couldn't move, and when I'm told I'm not supposed to do something, like hold still, I can't help but shake and try to control – sorry, I hurt my ear – I try to control my breathing, and I just tense up and freak out." (R.109:48).

After the polygraph examination Lambeseder escorted Vice to an interview room in the same building, left Vice there alone, scored the exam, and shared the results with Fisher. (R.109:32-33, see also 37-38). The detectives entered the interview room approximately fifteen minutes after the examination. *Id.* Neither detective testified to having told Vice that the polygraph examination had

concluded. However, the bottom portion of the Polygraph Examination Consent form indicated that the examination concluded at 11:40 a.m., and a second signature by Vice is subscribed thereunder. (R.10:2).

The interview room was small. (R.109:38). Vice was seated in a chair behind a small table. (R.109:19). His back was up against a wall. (R.109:21). When the detectives entered the room, Fisher seated himself directly across from Vice. (R.109:19-20). Lambeseder seated himself to Fisher's left. *Id.* The positioning was such that both detectives were between Vice and the door. (R.109:39). At no point during this interrogation was Vice told that he was free to leave. (R.109:20). And Vice did not believe he was free to leave. (R.109:49-50). The interrogation proceeded as follows:

When Lambeseder enters the interview room the very first thing he asks Vice is how he thinks he did on the exam. (R.128:2; A-App 118). Vice responds that he does not know, but that he knows for a fact that he was telling the truth. *Id.* Lambeseder then informs Vice that he "didn't pass the exam." *Id.* This is the first of what will be a total of eleven direct references to the polygraph examination and/or its results. Vice later testified that when he was told he failed the exam "my heart dropped. I honestly couldn't believe I failed the polygraph test. I didn't think I was going to fail 'cause I honestly – I didn't do it" (R.109:50). He was afraid he was going to be arrested. (R.109:50).

Lambeseder proceeds to tell Vice that on "the questions regarding [E.J.] it's very clear, Adam, that you weren't telling the truth" (the second direct reference). (R.128:3; A-App 119). Lambeseder then tells Vice that "we want to talk about that" i.e. the exam results (the third direct reference). *Id.* He goes on to tell Vice that he knows that "this has been weighing on you, and I can tell. And I can tell on that exam, okay? In fact, I can tell on your face it's been weighing on you." (the fourth direct reference). *Id.*

Vice then tells the detectives that he has no memory of committing these crimes. (R.109:22). "I'll be honest, ... 100 percent honest, and I'll take that test

again. I do not remember doing this. I honestly do ... and I will take the test” (R.128:4; A-App 120). Then he does something surprising, instead of questioning the test results, he questions himself. He says “but obviously I failed the test. Something’s wrong. Is there a way or is it any possibility that I - somehow blacked out and not remember this?” *Id.* He tells the detectives that “right now I feel like I’m having a heart attack.” *Id.* Lambeseder then “explains” to Vice that “[y]ou do remember doing it, otherwise you wouldn’t react the way you did on the exam” (the fifth direct reference). (R.128:4-5; A-App 120-21).

The detectives then suggest to Vice that maybe his acts were a result of his being a twenty-five-year-old virgin, of “not getting girls,” and that he just made a bad mistake. (R.128:4-6; A-App 120-22). They ask “[a]re you the guy who is going to do this to every little kid he comes in contact with?” to which Vice shakes his head in the negative. (R.128:6; A-App 122). Or “[a]re you the guy who made a mistake, made a poor choice, and we need to deal with that appropriately as opposed to the guy who going to do this to everybody.” *Id.* Vice’s response is illuminating, “I’m not going to do that ... I don’t know why I would do it -- first one, apparently.” *Id.* Then he asks, “[w]hat should I do?” *Id.*

The detectives tell Vice that it is important that he cooperate so he can “get the help you need.” (R.128:7; A-App 123). When Vice tells the detectives “I’m going to say flat out, I honestly don’t remember doing this, but I’m going to do what you say,” and Lambeseder then makes the sixth direct reference to the polygraph, telling Vice “It’s true. I see you wouldn’t react like that.” (R.128:8; A-App 124). Lambeseder then tells Vice that “probably what you want to do is block it out because it was a bad mistake.” *Id.* Vice apparently believes him because his response is “[h]ow do you get out of that? Because I honestly can’t remember, and its scaring me right now.” *Id.* Lambeseder then tells Vice that “without you saying I screwed up or admitting, ... we can’t help you.” *Id.* Fisher then makes the seventh direct reference to the polygraph, telling Vice that “[t]he

reason you reacted that way is because you know you did it. And that's why the reactions were that way.” (R.128:8-9; A-App 124-25).

Vice tells the detectives that he is scared, that he is “worrying about what else I’m blocking out. If I can’t -- I’m --I’m trying hard to remember this.” (R.128:9; A-App 125). Seven minutes into the interrogation, Lambeseder makes the eighth direct reference to polygraph examination. He tells Vice, “the thing is, it's -- you're trying to block it out but it's not blocked out, okay? Because you've reacted. You -- you know what you did, and you -- and you remember it.” *Id.* This time, Fisher tells Vice that if he does not confess, the District Attorney and Judge will conclude that “he’s dangerous, he’s -- all these other kids out there that he may have access to. We need to protect them.” (R.128:9-10; A-App 120-21). But if Vice were to confess to “an isolated mistake,” then “they can say okay, we can allow him to be in the community, you know. And that's for them to decide, but you have to give them that option.” *Id.* (*see also*, R.109:22). They offer Vice help, but first he has to confess. Lambeseder then asks, “can you do that for us right now?” *Id.*

So Vice tells the detectives “this is going to sound really shitty to hear me say this right now, but I sexually assaulted [E.J].” (R.128:10; A-App 126). However, when Lambeseder asks “can you explain what you did?” Vice responds “no, I cannot, I honestly can’t.” *Id.* He puts his head on the table and appears to begin crying saying, “I never fucking remember. I -- my whole body’s reacting to it. Why can’t I fucking remember ... I feel like I am going to throw up.” (R.128:10-11; A-App 126-127 and R.127 VIDEO at 12:06:30-12:07:35). Fisher offers him a box of tissues, and Lambeseder assures Vice “we know it happened.” *Id.*

But Vice doesn’t know. He tells the detectives “but I don’t know when ... I honestly don’t.” *Id.* Then Vice asks, “was I drinking?” *Id.* He tells them, “I don't know. I honestly don't know. I don't know if I was drunk. I don't know if I was -- I honestly don't know, and it's scaring me. It's like how did something --” *Id.*

Lambeseder interrupts, “but you do know.” *Id.* When Vice tells the detective that “I don’t remember,” Lambeseder again interrupts him and tells Vice “[y]ou do. You do remember. That’s just it, okay.” (R.128:12; A-App 128).

Vice then tells the detectives “I would tell you if I knew, but I – I’ll -- ***I’ll admit that I must have [done] it because obviously the test says I did it***, but I don’t physically remember. I’m trying honestly – I --.” (R.128:13; A-App 129; emphasis added). Vice just told the detectives that he does not remember committing the crime, but he believes that he must have committed the crime because the test says he did it. Vice tells the detectives that his heart is racing; that he “honestly can’t remember.” *Id.* And again, shortly thereafter, “I do not remember anything involving this situation whatsoever. I’m trying to remember. ***And obviously somehow in my subconscious I remember and I’m just trying to block it out*** and it won’t come out.” (R.128:15; A-App 131) (emphasis added).

Fisher then suggests that something happened on Halloween. *Id.* Vice remembers a number of details about Halloween, he remembers buying the girls crayons, but he insists that he does not remember any sexual or inappropriate acts. (R.128:15-16; A-App 131-32). Fisher then tells Vice that “if you don’t remember, or you’re saying you don’t remember, that’s not going to help you out at all. I mean, we can’t have people running around doing things they can’t remember and aren’t responsible for....” (R.128:17; A-App 133). At this point, Lambeseder makes the ninth direct reference to the polygraph. “Adam, like I said, okay, it shows on the test that you remember, okay?” *Id.* Fisher reinforces this statement with an indirect reference, telling Vice, “it happened. You remember it happening.” *Id.* Vice responds, “but I don’t know if I actually --” but Fisher interrupts, telling Vice that by saying he doesn’t remember, he is not taking responsibility. *Id.* Fisher tells Vice that he needs to confess, because “we need you to get help. ... so the rest of society can function with you in it.” (R.128:18; A-App 134).

Vice continues to tell the detectives that he cannot remember. He says “[b]ut I -- I don't know what I did. I honestly don't. I don't know if I took off her clothes, if she was in her underwear, if I tried licking her over her pants or her underwear, if I actually touched her, or if I took my pants off --.” *Id.* Lambeseder stops him, and tells Vice “[y]ou remember ... you do remember....” *Id.* Vice puts his head in his hands and Lambeseder then asks, “would it be easier if we just ask you, like, certain direct questions whether or not you did it or something?” *Id.* (and R.127 VIDEO; 12:15:25-40).

Adam Vice has now been telling the detectives for the last twenty minutes that he has no memory of the acts he is alleged to have committed. He has just told the detectives that he need details, that he does not know what he is supposed to have done. And the detectives have now offered to provide him with these details through direct questions. Adam Vice’s response to this offer is “I’ll -- I must have done it.” *Id.*

Detective Fisher then asks Vice if he placed his fingers under E.J.’s underwear and directly onto her vagina. Vice pauses, then answers “Yes.” (R.128:19 and R.129 VIDEO; 12:15:50-12:16:05; A-App 118-19). When Lambeseder asks “you’re recalling that right now?” Vice responds, “sort of.” *Id.* Then Vice begins to relate a vision he is conjuring up in his mind, “[I]ike I see myself going, like, with just one finger going through her front and going like this (indicating).” *Id.* Fisher asks, “you remember that?” Vice replies, “I think, Yes.” *Id.* Then Fisher asks, “[d]o you remember when?” Vice replies “No.” Then he says it “had to have been in October,” i.e. Halloween. *Id.* When Lambeseder asks “where were you when that happened?” Vice does not remember, but guesses, “I must -- downstairs in the big living room when she was on the bed.” *Id.* He again conjures up a vision “[s]he was on the right-hand side.” *Id.* But he is having difficulties producing the vision, he says, “I don’t know where her sister was. I can’t see that side.” *Id.* Fisher asks, “did you try to lick her vagina?” Vice answers, “I don’t know. I don’t think so,” and then under his breath “I’m trying--.”

Id. So Lambeseder asks “did you try to pull down her pants to do that?” and Vice answers “I think I tried just to pull down her pants so I could get my hand down her pants easier. Oh, God. I’m sick.” *Id.*

The detectives again assure Vice that they just want him to confess so they can get him the help he needs. *Id.* Vice, with obvious anguish in his voice asks the detectives “at least tell me this, because I honestly don’t remember, did I try having sex with her ... did I take off my pants and ...?” (R.128:21; R.129 VIDEO; 12:18:15-55; A-App 137). Lambeseder replies “you tell us,” and Vice says, “I don’t know. That’s why I’m trying to ask.” *Id.* When Lambeseder attempts to prompt such an admission, Vice responds, “I’m just trying -- I’m trying to think if I did or not. I don’t think I did.” *Id.*

Prompted by questions from the detectives Vice produces other “memories.” He denies pulling out his penis; says he tried to lick E.J. in the crotch but over her pants; that he took off her pants and put his hand beneath her underwear; but he denies trying to lick her crotch over her underwear, and he denies anything other than incidental contact with E.J.’s buttocks. (R.128:22; A-App 138). Vice then tells the detectives “[i]t hurts. I don’t know what it is, it feels like I’m getting a massive headache trying to break through these barriers or something.” (R.128:23; A-App 139). When Lambeseder asks Vice “what else had happened?” Vice replies, “I don’t know. Fucking monster.” *Id.*

Thirty minutes into the interrogation, Fisher makes the tenth direct reference to the polygraph, “Detective Lambeseder, he's been, you know, working with the polygraph things and we've been interviewing people. We know the techniques people use, you know, to try, you know, not remembering or it was their fault.” (R.128:24; A-App 140). If it was Fisher’s intent to firm up Vice’s recollections, it doesn’t work. Vice’s memories, vaporous as they are, begin to dissipate. Fisher tells him, “we need to know what happened,” but Vice responds “I don’t know It's -- it's -- I don't -- I think that's the only time. It's the only thing I can even somewhat remember.” (R.128:25; A-App 141). He denies any other

incidents, telling the detectives, “This is the first time I’ve been accused – was even accused ... [a]nd this is why it’s such a fricking shock.” *Id.* When Lambeseder presses him on the point Vice tells him, “No. I don’t see anybody.” Lambeseder responds “well try.” (R.128:26; A-App 142).

Lambeseder also presses Vice on the possibility that he is attracted to girls of this age, but Vice firmly denies this. (R.128:27; A-App 143). Lambeseder then changes tack, and suggests that Vice is a “twenty-five-year-old guy who just hasn’t had a girl yet.” *Id.* Vice latches onto this idea and says that he thinks it is “that one mixed with a little bit of alcohol.” (R.128:27-28; A-App 143-44). He tells the detectives that he doesn’t drink often, but when he does drink he doesn’t recall much of the night. *Id.* When Fisher asks, “but you do remember that?” meaning the touching of E.J., Vice replies “vaguely.” *Id.*

Nearing the end of the interrogation, with only ten minutes or so remaining, Lambeseder make the eleventh direct reference to the polygraph, telling Vice that “it’s clear to you, because you ... showed you did on the test, okay.” *Id.* Vice responds, “vaguely.” *Id.* He then tells the detectives “[l]ike I said, only thing I remember is coming home, playing video games, and drinking, and vaguely remember going into the other room. Pretty much like a dream at this point in time. That’s how fuzzy it is.” (R.128:29; A-App 145). To which, Lambeseder replies, “[t]hat’s natural. It’s – you’re trying to block it out because it was a mistake. It was a bad, bad situation, that’s natural.” *Id.*

Vice tells the detectives “that’s all I remember is what I said, going to the other room -- it’s just fuzzy as hell. Staggering around. I don’t remember the other girl being in there. I don’t even know what time it was. Or why [E.J.] didn’t scream or something like that. Or why anybody else didn’t see me. But I don’t remember falling asleep. I don’t remember waking up. I don’t remember anything.” *Id.* Fisher then asks, “[b]ut you remember staggering into the room?” and Vice answers, “that’s all I remember.” *Id.* Fisher attempts to convince Vice that his memory is actually quite good. (R.128:30-32; A-App 146-48). But Vice

is insistent that he has only “vague memories of doing the things I said I did ... Kind of -- like I said, *kind of like a dream. ... Like -- kind of like those déjà vu dreams that you have that you’re just sitting there and you say hey, I remember this in a dream.* It’s kind of like that.” (R.128:32; A-App 148). The detectives’ response is “but it’s real” and “it wasn’t a dream.” *Id.*

To summarize, after a forty-five-minute interrogation, Detectives Lambeseder and Fisher were able to extract from Vice a memory of touching E.J.’s vagina, and of attempting to lick her vagina but being unable to do so because of her pants. It was not a clear or firm memory, but rather a “vague,” “fuzzy,” “*déjà vu*,” “dream-like,” “somewhat” memory. (R.128:25, 27, 29 and 32; A-App 141, 44, 45, and 48).

On December 12, 2014, Vice was charged with First Degree Child Sexual Assault. (R.1). Vice’s first trial counsel immediately filed a motion seeking to suppress Vice’s confession. (R.8:1). This pleading was supplemented by briefs from the parties, and a recording of the post-polygraph interview. (R.9, R.12, R.13 and 18).

An evidentiary hearing on the suppression motion was held on May 6, 2015. (R.109). At the hearing it was stipulated by the parties that the recording was a fair and accurate depiction of the interview. (R.109:5). Testimony was received from Detectives Fisher, (R.109:6-24) and Lambeseder, (R.109:25-43), as well as from Adam Vice (R.109:43-60). In addition to the facts related above, Vice testified at the suppression hearing that he had been a special education student the entire time he was in school, that he received counseling for learning disabilities, and that he had diagnoses since elementary school for attention deficit hyperactivity disorder, depression, and anxiety. (R.109:47-48). He stated that he still suffered from all of these conditions when he took the polygraph examination. (R.109:47). On September 30, 2015, the circuit court granted Vice’s motion to suppress. (R.110:4-5). The State appealed that order. (R.13).

In the first appeal, Vice argued (1) that his polygraph examination and his post-polygraph interview were not discrete events, and (2) that the circuit court was correct in finding that the statements made by Vice during the post-polygraph interview were involuntarily given. *State v. Vice*, 2016 WI App 80, ¶¶ 24 and 29, 372 Wis.2d 185 (table), 888 N.W.2d 23, (A-App. 164 and 168; *per curium* decision cited for the law of the case). With regard to Vice’s first argument, this Court ruled that Vice’s trial counsel had conceded in the circuit court that the examination and statements were discrete events, and therefore, Vice was judicially estopped from arguing to the contrary on appeal. *Id.* at ¶ 21. With regard to Vice’s second argument, this court ruled that “we cannot discern from the circuit court’s oral ruling which facts the court considered important in concluding Vice’s confession was involuntary,” and therefore remanded the case for further fact-finding.” *Id.* at ¶ 29.

On remand, Vice obtained a new trial counsel who filed a second motion to suppress. (R.42 and R.47). The parties stipulated that additional testimony would not be required from Vice, Lambeseder, or Fisher. (R.118:3). Vice’s trial counsel, however, advised that she intended to elicit expert testimony concerning the coercive nature of Vice’s interview.¹ (R.118:4 and R.42:1). For that purpose, Vice’s trial counsel eventually retained Hollida Wakefield, M.A., LP, of the Institute for Psychological Therapies, who submitted a report and testified on those issues on June 22, 2018. (R.69:8-12 and R.122:45-85). Ms. Wakefield rendered her professional opinion that Vice’s interview was a “good example” of an internalized false confessions, induced by the detectives telling Vice that he failed a polygraph test and by leading him into believing that the polygraph reads his brain or taps into his subconscious, thereby causing him to become unsure about his memories. (R.122:48 and R.69:11-12; Res-Appx. 11-12).

¹ Initially from Dr. Lawrence T. White, Ph.D., Professor of Psychology, Beloit College. Health issues prevented Dr. White from testifying. (R.120:2-3).

Prior to the circuit court's second oral ruling on Vice's suppression motion(s) the parties submitted further briefs on the subject (R.78 and R.79), and made further oral arguments on the motion (R.123:65-90). During the final arguments, Vice's trial counsel argued that she believe Vice's prior trial counsel was wrong in conceding that the polygraph examination and post-polygraph interview were totally discrete events (and would argue in briefing that the concession constituted ineffective assistance of counsel). (R.123:76 and R.83:1). The circuit court also expressed concern about whether the post-polygraph interview was a totally discrete event from the polygraph examination, stating "there's a lot of factors to look at here that indicate that it wasn't a distinct interview." (R.123:88). On the other hand, the circuit court was concerned that it may be bound by the law of the case to accept the earlier concession. (R.123:89). So the court authorized the parties to brief the issue. (R.82 and R.83).

Court made its oral ruling on September 14, 2018. (R.124:1; A-Appx. 102). Before ruling on the voluntariness of Vice's statement, the court stated that "I've had a chance to do a more thorough review of the polygraph and the issues pertaining to the defendant's statements made thereafter. And after such, you know, I'm a little concerned that the defense may have prematurely conceded the point that the post-polygraph interview was wholly discrete and separate from the polygraph test." (R.124:4; A-Appx. 105). On the other hand, the circuit court also felt compelled to accept the Court of Appeals decision regarding the concession. *Id.* Consequently, the court made a number of finding of facts in the event the Court of Appeal would be willing to reconsider the issue. (R.124:4-6; A-Appx. 105-07).

First, the court found that "an officer who assisted with the interview that resulted in the confession was the same person who conducted the polygraph." *Id.* Second, "[t]he location of the interview was the same building as the polygraph but in a different room." *Id.* Third, "[t]he time between the polygraph in one room and the interview in another room is close ... minutes apart but not much

more than that.” *Id.* Fourth, “there are at least 11 separate references to the polygraph test during the interview.” *Id.* Fifth, that there was “a somewhat unique discussion” that led Vice to believe that “the polygraph said I did it so it must be true or words to that effect,” which went uncontradicted. *Id.* Sixth, that Vice’s “*Miranda* rights were discussed before the polygraph but not before the post-polygraph interview.” *Id.* And seventh, “in neither interaction was the defendant ever informed that the polygraph was not admissible in court but any statement could be.” *Id.*

On the voluntariness of the statements, the court made the following findings. It reiterated that the polygraph examiner participated in the interview, and that the polygraph was referenced by the detectives at least 11 times during the interview. (R.124:7; A-App. 108). It found that the interview was approximately forty-five minutes long, “which you do the math, you know, comes out to it being a fairly continuous reference.” (R.124:8; A-App. 109). It found that the detectives used “clearly misleading information regarding the test,” telling Vice that “because he failed the test, he must remember the sexual assault.” (R.124:7 and 9; A-App. 108 and 110). It also found that Vice “referred to the test himself as being proof that he committed a sexual assault and his conclusion was never challenged or corrected in any way.” (R.124:7; A-App. 108). The court found that “the test results were used over and over again to elicit a statement.” *Id.* It found that Vice was not told that the polygraph test would be inadmissible in court. (R.124:9; A-App. 110). And it found that “[t]he overt reference in this case to the polygraph test on multiple occasions with the actual polygraph examiner in the room and the use of clearly misleading information regarding the test without the benefit of telling the defendant the test would not be admissible in court together with the defendant drawing clearly erroneous conclusions; in other words, the test says I did it or words to that effect, had a tendency to create a certain coercive atmosphere.” (R.124:8-9; A-App. 109-10).

Regarding Vice's personal characteristics the circuit court found, first, that Vice was in his mid 20s at the time of the interview. (R.124:8; A-App. 109). Second, that "[h]e had little or marginal prior contacts with law enforcement." *Id.* Third, "[h]e apparently was able to finish high school but did have a history of special education." *Id.* Fourth, "[i]t does appear that he is competent and can reasonably understand the seriousness of the events but he's by no means sophisticated or wily in the operation of the criminal justice system." *Id.* Fifth, "[t]he defendant's demeanor at the time of the interview was a mixture of being both distraught with the news that he failed, nearly crying at times." *Id.* That "he got to the point that he was apparently physically sick and indicated that. And I'm satisfied that it does appear that to one extent or another, his physical state at times appeared to be compromised to a certain degree." *Id.*

The circuit court also found that Vice "was not otherwise restrained or physical abused, but he was isolated in a room for 45 minutes with the examiner and the investigator. The room wasn't apparently uncomfortable." *Id.* "[F]ormal *Miranda* warnings were not given prior to the statement but same or similar information was given to the defendant prior to the test. So he had information but not necessarily in conjunction with the statement that he gave." *Id.*

The circuit court stated it was particularly concerned with "statements made by both the examiner and/or the interviewer indicating that the test somehow is determinative that he does remember." (R.124:9-10; A-App. 110-11). The circuit court found that these statements were "clearly intended and was deliberately coercive and extremely effective." (R.124:10-11; A-App. 111-12). "While law enforcement is not required, necessarily, to always be truthful in an interview, we begin to cross lines when the examiner of a polygraph is there and perhaps information about what the polygraph may or may not mean is also given, that begins to have an impact, I believe, on the voluntariness of the statement." (R.124:11; A-App. 112). The circuit court concluded, when considering the totality of the circumstances, Vice's ability to resist was simply overwhelmed by

the detectives' coercive interrogation tactics. "I'm satisfied that the statement was not voluntary and I'm going to grant the motion to suppress again." *Id.*

VI. Argument.

A. The circuit court was correct in finding that Vice's confession had been involuntarily given.

This case was remanded to the circuit court "to engage in additional fact-finding and to determine, based on those facts, whether Vice's confession was voluntary." *State v. Vice*, 2016 WI App 80, ¶ 29, 372 Wis.2d 185 (table), 888 N.W.2d 23, (A-App. 168; *per curium*). After taking additional testimony, and receiving additional argument and briefing from the parties, the circuit court found that Vice's statements in the post-polygraph interview were involuntarily given. (R.124:12; A-App. 113).

The voluntariness of a confession is a question of constitutional fact. When presented with questions of constitutional fact the reviewing court examines two determinations of the trial court, but applies a different standard of review to each. "First, we review the circuit court's findings of historical fact under the clearly erroneous standard. Second, we independently apply constitutional principles to these historical facts." *State v. Wright*, 2019 WI 45, ¶22, 386 Wis.2d 495, 926 N.W.2d 157.

"A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *State v. Hoppe*, 2003 WI 43, ¶ 36, 261 Wis.2d 294, 661 N.W.2d 407. The courts must "inquire whether the statements were the result of coercion or otherwise improper conduct by law enforcement." *Id.* at ¶ 37. "If neither coercion nor other improper conduct was used to secure the statement, it is deemed voluntary." *Id.*

The courts apply a “totality of the circumstances standard to determine whether a statement was made voluntarily.” *Id.* The courts “must balance the personal characteristics of the defendant, such as age, education, intelligence, physical or emotional condition, and prior experience with law enforcement, with the possible pressures that law enforcement could impose. ... Possible pressures to consider include the length of questioning, general conditions or circumstances in which the statement was taken, whether any excessive physical or psychological pressure was used, and whether any inducements, threats, methods, or strategies were utilized in order to elicit a statement from the defendant.” *Id.* at ¶¶ 38-39.

Moreover, in cases where the statement was elicited following a polygraph examination, “[a]n important inquiry [in determining voluntariness] continues to be whether the test result was referred to in order to elicit an incriminating statement.” *State v. Davis*, 2008 WI 71, ¶ 42, 310 Wis.2d 583, 751 N.W.2d 322; *See also, People v. Sickley*, 448 N.E.2d 612, 114 Ill.App.3d 167 (1983) (“the alleged failure of the defendant to pass the polygraph examination was an event, if not the event, used by the examiner to confront the defendant and to coerce his cooperation”).

This case concerns the use of psychological pressures to coerce a confession. The State attempts to minimize the psychological pressures that were applied to Vice by characterizing statements made by the detectives as merely “truthfully relaying that Vice failed the polygraph test.” (State’s Br. 34). The circuit court, however, found the detectives comments to be “deliberately coercive and extremely effective.” (R.124:9-11: A-App. 110-12). In particular, the circuit court found coerciveness in the combination of (1) the polygraph examiner’s participation in the post-polygraph interview, (2) his constant references to the polygraph results during the interrogation, and (3) the use of “clearly misleading information” about the polygraph machine, notably in assertions that it detected in Vice memories of the incident. *Id.*

This is not a case where law enforcement merely informed the suspect at the end of polygraph examination that he had failed the test. *See e.g., State v. Greer*, 2003 WI App 112, ¶ 16, 265 Wis.2d 463, 666 N.W.2d 518. Here the detectives, and in particular the polygraph examiner; repeatedly made references to the results of the polygraph examination in order to convince Vice that his memory could not be trusted. They told Vice he had blocked memories which caused his body to react in such a way that he failed the examination. When Vice told the detectives that he had no memory of committing this crime, Lambeseder told him that “You do remember doing it, otherwise you wouldn’t react the way you did on the exam.” (R.128:4-5; A-App 120-21). They continued that refrain throughout the entire interview. *See*, (R.128:8; A-App 124) (R.128:8-9; A-App 124-25) (R.128:10-11; A-App 126-127) (R.128:17; A-App 133) (R.128:24; A-App 140) and (R.128:27-28; A-App 143-44).

The polygraph examiner’s presence during the interview was also significant because Lambeseder was put forward as a person with special expertise in polygraph examinations and the interpretation of their results. (R.128:24; A-App 140). When he told Vice that he was trying to “block out” the memory, Vice took that as statement of scientific fact. (R.128:8; A-App 124) (R.128:9; A-App 125). When he told Vice that “you’re trying to block it out but it’s not blocked out, okay? Because you’ve reacted,” the implication was clear, the machine had detected a memories that Vice was repressing. (R.128:9; A-App 125). This was a tactic which by its very design was likely to induce a false confession. And the effectiveness of this line of interrogation can be seen when Vice finally concedes “I’ll admit that I must have [done] it because obviously the test says I did it, but I don’t physically remember.” (R.128:13; A-App 129).

The State cites the case of *United States v. Rutledge*, 900 F.2d 1127, 1130 (1990), for the proposition that “[t]he police are allowed to play on a suspect’s ignorance, his anxieties, his fears, and his uncertainties; *they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational*

decision becomes impossible.” (emphasis added; State’s Br. 37). But that is just the point. In Vice’s case, the detectives *did* magnify Vice’s ignorance, anxieties, fears and uncertainties to the point that a rational decision became impossible. When Vice says, “obviously somehow in my subconscious I remember and I’m just trying to block it out and it won’t come out,” Vice did not come up with that idea on his own, the detectives planted that thought in Vice’s mind. (R.128:15; A-App 131)

Similarly, the State argues that “[e]ven if Detective Lambeseder had made a definitively false statement, `misrepresentation or trickery does not make an otherwise voluntary statement involuntary.’” (State’s Br. 34). But lies *are* relevant to the voluntariness analysis. In *Frazier v. Cupp*, 394 U.S. 731, 739 (1969), the Supreme Court wrote, “[t]he fact that the police misrepresented the statements that Rawls had made is, *while relevant*, is insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the ‘totality of the circumstances.’” (emphasis added). This case is often thought to be an endorsement for lying by law enforcement. It is not. The case is only an acknowledgement that the analysis does not end with proof of the lie.

It is widely recognized that falsehoods which are “reasonably likely to produce an untrue statement” can render a confession inadmissible. *See, Walker v. State*, 194 So. 3d 253 (Ala. Crim. App. 2015); *Goodwin v. State*, 373 Ark. 53, 281 S.W.3d 258 (2008); *People v. Scott*, 52 Cal. 4th 452, 129 Cal. Rptr. 3d 91, 257 P.3d 703 (2011); *Daniel v. State*, 285 Ga. 406, 677 S.E.2d 120 (2009); *State v. Baylor*, 423 N.J. Super. 578, 34 A.3d 801 (App. Div. 2011); *People v. Bradberry*, 131 A.D.3d 800, 16 N.Y.S.3d 97 (4th Dep’t 2015); *State v. McKinney*, 153 N.C. App. 369, 570 S.E.2d 238 (2002).

In their nature the falsehoods told to Vice were particularly insidious. These were falsehood likely to induce a false confession because they caused Vice to question his own memories. A polygraph test cannot ascertain guilt or innocence. (R.122:56-58). A polygraph cannot read minds or tell if a person

remembers or forgets some particular event. *Id.* When Lambeseder says that he can see in the polygraph results memories that Vice is blocking out, this is complete nonsense. *Id.* In fact, there is little evidence that polygraphs can even detect deception. At best, polygraphs detect fear. See, *The Truth About Lie Detectors (aka Polygraph Tests)*, American Psychological Association, August 5, 2004 (Res-Appx. 51-52; “There is no evidence that any pattern of physiological reactions is unique to deception.” ... “a lie detector might better be called a fear detector.” ... “Most psychologists and other scientists agree that there is little basis for the validity of polygraph tests”). The tactic used on Vice while subtle, was both coercive and effective in its psychological effect. (R.124:10-11; A-App. 111-12). Vice genuinely believed that he must have committed the crime because the “test says I did it.” (R.124:10-11; A-App. 111-12). The investigators were able to use this mistaken belief to overcome Vice’s will, to have Vice question his own memories, and thereby coerce him into conjuring up visions of himself committing a crime for which he had no previous memory. (R.128:19-20; A-App 118-19).

The State completely ignores the testimony and report of Ms. Wakefield. She testified that Vice’s interview was “a good example of what they call internalized false confessions in which the person doesn't just give in because they think things will go better, but they think oh, gosh, the lie detector. It's tapping into my unconscious. I must have done it.”² (R.122:48). In her report, she elaborated that “[t]elling the suspect he failed the polygraph test is a common interrogation technique designed to obtain a confession. The interrogators present the polygraph as infallible and a naïve suspect may believe this. ... The person may be led to believe the polygraph reads his brain or taps into his subconscious. He may become unsure of his memories and think he had some type of mental block. He

² In her testimony, (R.122:50), Ms. Wakefield referenced a white paper by the American Psychiatric Association which discusses “internalized false confessions” *see*, Kassin, S. M., Drizin, S. A., Grisso, T., Gudjonsson, G. H., Leo, R. A., & Redlich, A. D. (2010). *Police-induced confessions: Risk factors and recommendations*. *Law and Human Behavior*, 34(3), page 13 (Res-Appx. 26).

may attempt to recover his memories of the incident and to believe he must have committed the crime. Gudjonsson defines this as a coerced-internalized false confession and gives examples.” (R.69:11-12). In her testimony, Wakefield specifically noted that a National Research Council Committee established to review the scientific evidence on polygraphs, expressed concern over the risk of false confessions entailed by telling suspects they had failed a polygraph examination.³ (R.122:51-52).

It is not only the scientific community which has found such interrogation techniques to be untrustworthy. Courts in many jurisdictions have found techniques quite similar to those used by the detectives in Vice’s case to be coercive, and have suppressed the confessions elicited thereby. Assertions of the polygraph’s infallibility have repeatedly been held to be a coercive tactic. In *State v. Craig*, 262 Mont. 240, 241, 864 P.2d 1240 (Mont., 1993), the Montana Supreme Court suppressed a confession when both the examiner and investigating detective who interrogated Craig kept telling him that “that the machine is proof that he lied.” The court wrote, “[r]egardless of its acceptability among the police, it is not acceptable to this Court for the police to use the results of a polygraph examination to tell a defendant that he lied in order to extract a confession.” *Id.* at 242. In *People v. Leonard*, 59 A.D.2d 1, 397 N.Y.S.2d 386, 392 (N.Y. App. Div., 1977), a confession was found to be involuntary and suppressed when the police told the defendant that “the truth was know by God, the defendant, and the polygraph machine, and that the polygraph machine proved he was lying.” *See also, State v. Davis*, 381 N.W.2d 86 (Minn. App., 1986) (confession suppressed

³ See, National Research Council 2003. *The Polygraph and Lie Detection*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/10420>. Page 56. (“False confessions are more common than sometimes believed, and standard interrogation techniques designed to elicit confessions—including the use of false claims that the investigators have definitive evidence of the examinee’s guilt—do elicit false confessions (Kassin, 1997, 1998). There is some evidence that interrogation focused on a false-positive polygraph response can lead to false confessions. In one study, 17 percent of respondents who were shown their strong response on a bogus polygraph to a question about a minor theft they did not commit subsequently admitted the theft (Meyer and Youngjohn, 1991).”). (Res-Appx. 50).

when, among other things, suspect was told that the polygraph was “foolproof”); and *Martinez v. State*, 545 So. 2d 466 (Fla. 4th DCA, 1989) (polygraph examiner told accused that it was "impossible" that he was being truthful).

Courts have also suppressed confessions where the interrogators used the polygraph results to induce the accused into questioning the validity of their own memories. In *State v. Sawyer*, 561 So.2d 278, 289-90 (Fla. 2d DCA, 1990), in what was a particularly egregious case of coercion, the court focused special attention on the polygraph examiner’s having told Sawyer that the polygraph machine was detecting repressed or hidden memories; and with the detectives’ suggestion that Sawyer visualize the commission of the crime. Much like Vice, Sawyer was told by his polygraph examiner that his physiological responses were evidence of memories. He was told that his “heart was talking to him, his conscience; Sawyer's belief in his own innocence was useless.” *Id.* at 290. And much like Vice, Sawyer was encouraged to visualize himself committing the crime. Sawyer was told to “disregard his reliance on his own senses of what happened on the night of the killing, accept the blackout theory, and ‘picture’ what could have happened. Sawyer also accepted [the detective's] suggestion that he imagine or ‘picture’ what it would have been like to do the killing, which he does not recall because of a blackout.” *Id.* at 289. Similarly, the detectives in Vice’s case, after convincing Vice that he must have committed the crime because the machine said he did, (R.128:13; A-App 129); encouraged Vice to visualize a crime, (R.128:19; A-App 118-19); again based upon a drunken blackout theory. (R.128:27-28; A-App 143-44). *See also, State v. Valero*, 285 P.3d 1014, 1018 (Idaho App., 2012) (“on more than one occasion, the detective conveyed to Valero that, from the polygraph, there was no question what Valero had done and, in essence, that the polygraph was determinative of his guilt. The coercive nature of this misrepresentation can be seen one last time as Valero attempted to deny the accusations, stating ‘I never would touch her but if that thing [the polygraph] says I did....’ To which the detective responded ‘Well, you did’”).

This is not how you find out the truth, this is how you create false memories. See, Loftus, E.F., *Creating False Memories*, Scientific American, vol. 277, pages 70-75 (1997) (Res-Appx. 53-63) (“Research is beginning to give us an understanding of how false memories of complete, emotional and self-participatory experiences are created in adults. First, there are social demands on individuals to remember; for instance, researchers exert some pressure on participants in a study to come up with memories. Second, memory construction by imagining events can be explicitly encouraged when people are having trouble remembering.”; Res-Appx. 61).

Other similarities can be seen in the case of *People v Zimmer*, 68 Misc. 2d 1067, 329 N.Y.S.2d 17,(1972), *affirmed* 40 App. Div. 2d 955, 339 NYS2d 671. In that case a confession was suppressed when the defendant was not told that the results of the polygraph test would be inadmissible at trial, and was even shown literature which stated that the results of the test could, in fact, be used in court against her. Similarly, the circuit court in Vice’s case found that Vice was not told that the polygraph examination would be inadmissible in court. (R.124:9; A-App. 110). Moreover, a reading the Polygraph Examination Consent form would lead one to believe that some evidence of the polygraph examination was admissible. Paragraph two states, among other things, that “I fully realize that: I am not required to take this examination, I may remain silent the entire time I am here, [and] *anything I say can be used against me in a court of law ...*” (R.10:2) (emphasis added). These are significant facts, because Vice believed that the test had shown him guilty, despite his lack of memory concerning the crime. Failing to advise Vice that the polygraph results were inadmissible in court, and providing information suggesting that statements made during the polygraph examination were admissible, further increased the psychological pressure place upon Vice.

The detectives placed other psychological pressures on Vice. The circuit court found that Vice was kept in isolation before and during the interview. (R.124:8; A-App. 109). *Compare, Zimmer, supra* at 24 (“She was alone,

bewildered, with no one to advise her what to do next, except Inv. Scott insisting she had lied”). When the detectives entered the interview room they seated themselves in such a way that Vice would have to go through the detectives if he were to leave. (R.109:39). And at no point during the interrogation was Vice told that he was free to leave. (R.109:20).

Also, during the interrogation the detectives took advantage of Vice’s insecurities, telling him that it was necessary for him to confess if he wanted to get help. (R.128:7; A-App 123) (R.128:9-10; A-App 125-26) (R.128:18; A-App 134). Indeed, at one point, Fisher turned this tactic into a threat, telling Vice “you’re saying you don’t remember, that’s not going to help you out at all. I mean, *we can’t have people running around doing things they can’t remember.*” (R.128:17; A-App 133; emphasis added). Having convinced Vice that he must have committed a sexual assault upon a child, because the polygraph machine said that he did, they further convinced Vice that he had to confess in order to get help. *Id.* That was unmistakably coercive. *Cole v. State*, 923 P.2d 820, 831-32 (Alaska App., 1996) (detectives declarations that the purpose of the interrogation was to get defendant the help he needs; along with declaration that he could only get this help if he confesses, was “unmistakably coercive”); *but see contra, Turner v. State*, 76 Wis.2d 1, 22, 250 N.W.2d 706 (1977).⁴

Further, when Vice told the detectives that he wanted to confess, but that he could not remember what he had done, the detectives decided to feed him the answers by asking him direct and sometimes leading questions. (R.128:19-21; A-App 118-20). The occurrence of fact-feeding by the police strongly weighs against voluntariness. See *State v. Rettenberger*, 984 P.2d 1009, ¶ 40 (Utah 1999) (confession is involuntary when it "contains little information that was not first provided or suggested by the interrogating officers"); *State v. Randle*, 366 S.E.2d

⁴ *Turner* is distinguishable in that the “getting help” ploy was never used as a threat, as it was in Vice’s case.

750 (W. Va. 1988) (confession was involuntary when police used suggestive questioning to propose how the crime could have occurred to the suspect); *cf.* *State v. Samuel*, 2002 WI 34, ¶ 31, 252 Wis. 2d 26, 643 N.W.2d 423 (when deciding whether to admit witness statements obtained during police questioning, courts examine "whether a witness was coached on what to say" and "whether investigating authorities asked questions blatantly tailored to extract a particular answer").

The circuit court also found that “formal *Miranda* warnings were not given prior to the statement but same or similar information was given to the defendant prior to the test. So he had information but not necessarily in conjunction with the statement that he gave.” (R.124:8; A-App. 109). The State takes umbrage at this finding, and at the same time, insists that Vice had the benefit of earlier *Miranda* warnings. (State’s Br. 37). However, the circuit court’s observation about the *Miranda*⁵ warnings not being proximate to the detective telling Vice that he has failed the test is well taken. Other courts have “...suggested that once the examiner informs a defendant he has ‘failed’ the test, any further testing or questioning has `moved from administration of [the] polygraph examination to police interrogation’ and requires renewed *Miranda* warnings, even assuming they have been given earlier.” *People v Johnson*, 112 Misc. 2d 590, 447 NYS2d 341 (1981), *citing*, *Henry v. Dees*, 658 F.2d 406 (1981). Certainly, the proximity of the *Miranda* warnings to telling the suspect that he has failed a polygraph examination is relevant to the voluntariness of any statement elicited thereby.

This is a totality of the circumstances analysis; these things add up. At every step in Vice’s interrogation the detectives were seeking a confession, and not simply trying to solve a crime. It is apparent in their methods, statements and behavior, that their only goal was to get Vice to confess. When it is shown that the undeviating intent of the officers is to extract a confession from the defendant, the

⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966)

confession obtained must be examined with “the most careful scrutiny.” *Spano v. New York*, 360 U.S. 315, 324 (1959).

When the circuit court looked at Vice’s personal characteristics it found that Vice was in his mid 20s at the time of the interview. (R.124:8; A-App. 109). That “[h]e apparently was able to finish high school but did have a history of special education.” *Id.* The testimony received indicated that he received counseling for learning disabilities since elementary school, and had diagnoses for attention deficit hyperactivity disorder, depression, and anxiety. (R.109:47). One additional fact, not mentioned in the oral ruling, but worth noting, is that he was a twenty-five-year-old virgin, and probably somewhat uncertain in his sexuality, a fact that the detectives brought up repeatedly to suggest that Vice had a sexual problem for which he needs help. (R.128:4-6; A-App 120-22) (R.128:27; A-App 143).

Regarding his mental state and demeanor during the interview, the State argues that Vice was “relatively calm,” and “did not cry,” conceding only that he “was nervous.” (State’s Br. 33). That characterization is flatly contradicted by the circuit court’s findings of historical fact. The court found that “[t]he defendant’s demeanor at the time of the interview was a mixture of being both distraught with the news that he failed, nearly crying at times.” (R.124:8; A-App. 109). “He got to the point that he was apparently physically sick and indicated that. And I’m satisfied that it does appear that to one extent or another, his physical state at times appeared to be compromised to a certain degree.” *Id.*

Most importantly, the circuit found that “[h]e had little or marginal prior contacts with law enforcement,” and while “[i]t does appear that he is competent and can reasonably understand the seriousness of the events but he’s by no means sophisticated or wily in the operation of the criminal justice system.” (R.124:8; A-App. 109). Vice was subjected to a sophisticated and nuanced interrogation. His understanding of polygraphs was flawed and naïve, and his interrogators played upon and magnified his naivete, his insecurities, his ignorance and his

inexperience. Vice's statements were not the product of "a free and unconstrained will," but rather false memories, "the result of a conspicuously unequal confrontation in which the pressures brought to bear on him by representatives of the State exceeded his ability to resist." Indeed, how *could* a confession be said to be the product "a free and unconstrained will" when it was induced by a belief that a machine had detected a "memory" for which the suspect had no prior awareness? The circuit court was correct in finding Vice's confession was involuntarily given.

B. Alternatively, the polygraph examination and the post-polygraph interview were not two "totally discrete events."

1. Cogent, substantial, and proper reasons exist for this Court to reconsider whether or not the polygraph examination and the post-polygraph interview were two "totally discrete events."

In its oral ruling, the circuit court stated that "I've had a chance to do a more thorough review of the polygraph and the issues pertaining to the defendant's statements made thereafter. And after such, you know, I'm a little concerned that the defense may have prematurely conceded the point that the post-polygraph interview was wholly discrete and separate from the polygraph test." (R.124:4; A-Appx. 105). The circuit court then made a number of findings of fact in the event this Court is willing to reconsider the issue. (R.124:4-6; A-Appx. 105-07). That, of course, brings up an issue concerning the law of this case.

"The law of the case doctrine is a longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *State v. Stuart*, 2003 WI 73, ¶ 23, 262 Wis.2d 620, 664 N.W.2d 82, quoting, *Univest Corp. v. General Split Corp.*, 148 Wis.2d 29, 38, 435 N.W.2d 234 (1989). However, the rule "is not absolute." *Stuart*, 2003 WI 73 at ¶ 24. And in certain circumstances, where "cogent, substantial, and proper reasons exist," a court may disregard the doctrine and reconsider prior rulings in a case. *Id. citing, State v.*

Brady, 130 Wis.2d 443, 448, 388 N.W.2d 151 (1986). This is so “because the law of the case [is] a question of court practice and not an inexorable rule, it require[s] the exercise of judicial discretion.” *Mullen v. Coolong*, 153 Wis.2d 401, 451 N.W.2d 412 (1990)

There are at least three cogent, substantial, and proper reasons for this Court to consider whether or not the polygraph examination and the post-polygraph interview were two “totally discrete events.” First, it will be difficult, if not impossible, to admit Vice’s confession into evidence while keeping out that Vice had failed a polygraph examination. (R.122:93-94 and R.124:6-7; A-App. 107-08). The problem here is two-fold, as the circuit court found, the references to the polygraph results were “fairly continuous.” (R.124:8; A-App. 109). Evidence of the polygraph results were so “intertwined” with the confession, it is questionable whether the interview can be redacted so as to keep that particular information out. (R.122:93-94). There is a risk, as the circuit court put it, of “poisoning the jury well with this whole idea that, you know, oh, he took a polygraph and the polygraph is accurate and, therefore, he's guilty.” *Id.* Further there is also a question of whether Vice will be able to present a defense at trial that his confession was involuntarily given. Under *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 265, 133 N.W.2d 753 (1965), if a confession is held voluntary by the trial court, and admitted into evidence, the issue of the confession’s voluntariness may be still be presented to the jury for its consideration. In Vice’s situation, that will necessarily require presenting evidence concerning the manner in which the interrogators used the polygraph results. However, the law in Wisconsin with regard to polygraph evidence is one of unconditional inadmissibility. *State v. Dean*, 103 Wis.2d 228, 307 N.W.2d 628

(1981). So Vice may be barred from presenting this defense, and obtaining a fair trial.⁶

Second, this Court in the first appeal did not actually decide the issue of whether Vice's polygraph examination and the post-polygraph interview were two totally discrete events. What this Court held was that Vice's first trial counsel had conceded in the circuit court that the examination and statements were discrete events, and that therefore, Vice was judicially estopped from arguing to the contrary on appeal. *Vice*, 2016 WI App 80, at ¶ 21. That is, the decision was based upon a forfeiture by Vice's first trial counsel. That was not the case with Vice's second trial counsel, who argued that because of the multiple references to polygraph results, and the manner in which those results were incorporated into the detectives interrogation, the polygraph was not distinct from the interview. (R.83). Moreover, the State in this appeal has chosen to brief the issue, thereby opening the door for its reconsideration. (State's Br. 22-29). Again, this Court's first decision was based upon considerations of equitable estoppel, not the merits of the case. Those considerations no longer exist, as the matter has been argued and briefed by the State. *See, State v. Armstrong*, 2014 WI App 59, ¶ 20, 354 Wis.2d 111, 847 N.W.2d 860 (holding that this Court always has the discretion to address issues that involve a question of law, that have been briefed by the opposing parties, and are of sufficient public interest to merit a decision). Further, Vice is the respondent in this case. The longstanding rule in the State of Wisconsin has been that a respondent may advance any argument that will sustain the circuit court's ruling, regardless of whether the respondent made that argument in the circuit court. *State v. Darcy N.K.*, 218 Wis.2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998) ("a respondent may advance for the first time on appeal any argument that will sustain the trial court's ruling."); *State v. Lock*, 2013 WI App

⁶ The issue has not been addressed in Wisconsin. *But see, State v. Schaeffer*, 457 N.W.2d 194 (Minn., 1990) and *People v. Melock*, 149 Ill.2d 423, 599 N.E.2d 941 (1992), for the proposition that precluding the admission of polygraph evidence when voluntariness is at issue would deny the defendant a fair trial.

80, ¶ 40, 348 Wis.2d 334, 833 N.W.2d 189 (“...while appellants are limited to the same arguments they made in the circuit court ... respondents are not”).

Finally, this issue will not go away. If Vice’s confession is admitted into evidence, and Vice subsequently convicted of this crime, the issue will surely be raised again as ineffective assistance by Vice’s first trial counsel. Failure to fully inform oneself of the law can constitute deficient performance. *State v. Felton*, 110 Wis.2d 485, 329 N.W.2d 161 (1983). And the forfeiture of this issue certainly caused Vice prejudice, as it may have allowed the admission of a confession that should have been suppressed. “A defendant’s confession is ‘probably the most probative and damaging evidence that can be admitted against him.’” *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991), quoting, *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting).

2. The polygraph examination and the post-polygraph interview were not two “totally discrete events.”

While “the results of polygraph examinations are not admissible in criminal proceedings, ... persons accused of a crime can take them voluntarily in an effort to lift the cloud of suspicion. Anything that a defendant says during what is considered to be part of the polygraph examination is not admissible.” *Greer*, 2003 WI App 112 at ¶ 9 (citations omitted). Statements that a defendant makes after the polygraph examination is over, however, may be admissible. *State v. Johnson*, 193 Wis.2d 382, 388, 535 N.W.2d 441 (Ct.App.1995).

The framework for determining when statements made during post-polygraph interviews are admissible in criminal proceedings was discussed at length in *State v. Davis*, 2008 WI 71, 310 Wis.2d 583, 751 N.W.2d 332.⁷ It entails a two-step analysis. First, there is a threshold determination of whether the polygraph examination and the incriminating statement were the product of one

⁷ *Davis* did not involve a polygraph, but rather a voice stress analysis. Nonetheless, the Court, held that “we see no reason at this time to treat these two methods of ‘honesty testing’ differently.” *Davis*, 2008 WI 71, ¶ 20.

event, or two “totally discrete” events. *Davis*, 2008 WI 71, ¶ 2. “When a statement is so closely associated with the voice stress [or polygraph] analysis that the analysis and statement are one event rather than two events, the statement must be suppressed.” *Id.* If the statement survives this first test, then, “as is the case with any statement, the statement must also survive constitutional due process considerations of voluntariness.” *Id.*

With regard to statements made during a post-polygraph interview “the touchstone of admissibility is whether the interviews eliciting the statements are found to be totally discrete from the examination which precedes them.” *Davis*, 2008 WI 71, ¶ 29, citing *Greer*, 2003 WI App 112, ¶ 10, citing *State v. Schlise*, 86 Wis.2d 26, 42, 271 N.W.2d 619 (1978). “Stated another way, statements that a defendant makes after he or she takes a polygraph examination will be suppressed if [t]he post-mechanical interview was so closely associated with the mechanical or electronic testing, both as to time and content, that it must be considered as one event.” *Greer*, 2003 WI App 112, ¶ 10, citing *Schlise*, 86 Wis.2d at 42. To help make this determination the courts have created a five-factor analysis:

- (1) whether the defendant was told the test was over;
- (2) whether any time passed between the analysis and the defendant’s statement;
- (3) whether the officer conducting the analysis differed from the officer who took the statement;
- (4) whether the location where the analysis was conducted differed from where the statement was given; and
- (5) whether the voice stress analysis [or polygraph examination] was referred to when obtaining a statement from the defendant.

Davis, 2008 WI 71, ¶ 23 (formatting altered).

Now Vice certainly signed a form containing boilerplate language to the effect that the test was over. (R.10:2). The record does not indicate whether Vice was verbally told that the polygraph examination was over. In any event, this is a totality of the circumstances test, so no one factor will trump the other elements. This case differs from other cases which have preceded it, in that, while Vice may

have signed a form stating that the polygraph examination was over, the polygraph examiner then proceeded to attend the post-polygraph interview, and in the course of that interview made repeated and constant references to the polygraph examination and its results. And he did so as an integral and essential part of his interrogation strategy. That is a fact scenario that has never been presented to the courts before.

In *Davis* the Court made a specific point of the fact that “at no time during the interview did the interviewing detective relate back to or rely on the voice stress evaluation or its results.” *Davis*, 2008 WI 71, ¶ 33. Similarly, in *Johnson* it was significant that “the police officer did not refer back to the polygraph examination or tell the defendant that he failed the test during post-examination questioning in order to elicit an incriminating statement.” *Johnson*, 193 Wis.2d at 389. Only in *Schlise* do we have a situation in which a polygraph examiner participates in the post-examination interview and makes frequent references to the polygraph examination, and in *Schlise* the post-examination statements were suppressed. *Davis*, 2008 WI 71, ¶ 27.

This is not a case where the detectives made a single reference to the polygraph results at the end of the polygraph examination. *E.g. Greer*, 2003 WI App 112 at ¶ 6. Here the detectives made at least eleven references to the results, during the post-polygraph interview, at a “fairly continuous” rate. (R.124:8; A-App. 109). The last reference came at thirty-five minutes into a forty-five-minute interrogation. (R.129 VIDEO; 12:27:00-05). The results of the polygraph examination were most certainly being “referred to when obtaining a statement from the defendant.” *Davis*, 2008 WI 71 at ¶ 23. And these were not passing references to the results, in which the detectives were merely “truthfully relaying that Vice failed the polygraph test.” (State’s Br. 34). The polygraph results were used by the detectives as an integral part of their interrogation strategy, further helping to blur the distinction between the polygraph examination and the post-polygraph interview.

It bears noting that most of the references to the results are being made by Lambeseder, the polygraph examiner. That is a relevant factor under the test, “whether the officer conducting the analysis differed from the officer who took the statement.” *Davis*, 2008 WI 71, ¶ 23. Here we have the detective who conducted the examination, participating in the post-polygraph interview, and making repeated references to the polygraph examination and its results. (R.124:4-5; A-Appx. 105-06). How is this keeping the post-polygraph interview “totally discrete” from the polygraph examination? It isn’t, it’s hopelessly muddling the two events together.

With regard to the other factors, the circuit court found that “[t]he location of the interview was the same building as the polygraph but in a different room.” *Id.* So there was some proximal separation. However, this factor doesn’t help the State as much as it should because the detectives then immediately began talking about the polygraph results in the interview room, thus blurring the distinction between the two locations. The circuit court also found “[t]he time between the polygraph in one room and the interview in another room is close ... minutes apart but not much more than that.” *Id.* So there was very little temporal separation between the two events.

Vice’s argument is quite simple, while he did sign a form that the polygraph examination was over, the detectives through their repeated and constant references to the polygraph examination during the post-polygraph interview, and the manner in which the detectives made those references integral to their interrogation strategy, so muddle together the two events that they can no longer be deemed two “totally discrete events.”

VII. Conclusion.

Wherefore, Adam Vice requests this Court affirm the order of the circuit court, suppressing his statements made during the post-polygraph interview on December 11, 2014.

Respectfully submitted August 14, 2019.

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VIII. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10985 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Appellant, with three copies of this brief the same day it was filed with this court.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated August 14, 2019.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by priority mail on August 14, 2019. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: August 14, 2019

Signature: _____